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ABSTRACT

While the First Amendment guarantees an individual the right to be heard, this is an issue distinct from assuring the opportunity to be heard. In broadcast media, the opportunity, or access, has been largely determined by two factors: economics, or who owns the means to an audience, and the Federal Communications Commission (FCC) regulation of the limited frequency spectrum. Historically, the Supreme Court has extended the FCC power beyond license distribution to matters involving programing. Eventually, the "fairness doctrine" evolved to ensure the consumer's right to hear, through a federal evaluation of the broadcaster's fulfillment of editorial responsibilities. However, a reasonable interpretation of the First Amendment states that the government is to have no direct control over the process by which people are informed. The means of transmission may be subject to external constraints, while the message is free from any form of intervention. If broadcasters are to be held accountable for their programing, then they must be free to accept responsibility for their expressions. (MAI)

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TOWARD A NEW FREEDOM OF EXPRESSION FOR BROADCASTERS

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TOWARD A NEW FREEDOM OF

EXPRESSION FOR BROADCASTERS

The issues we intend to raise in this paper, and the point of view we intend to put forth, are perhaps best captured by a quote attributed to Benjamin Franklin: "My publication is not a stagecoach with seats for everyone."

For more than a quarter of a century broadcast media have been subject to a government imposed fairness requirement, a federal mandate to seek out opposing points of view. Quite unlike Franklin's stagecoach, broadcast media have become, in a sense, common carriers; and broadcasters themselves have been assigned the role of fiduciary, a kind of "guardian" whose limited discretionary powers circumvent the laissez-faire premise of the First Amendment.

In their earlier years broadcast media were predominantly entertainment media, and thus "freedom of the press" was a banner seldom raised. Indeed, until 1949 broadcasters were prohibited from editorializing. Since the early 1960's, however, broadcasting has evolved into a powerful and influential journalistic enterprise, an agency of social communication to which millions of Americans turn for their daily diet of news and other public affairs programming. Accordingly, government demands for balance and equity--principally the Federal Communications Commission's "fairness doctrine" and the "equal time" section of the 1934 Communications Act--now take on an entirely new dimension: today it is in the area of broadcast journalism that these rules and regulations have their greatest impact. In effect, then, broadcasters have emerged as second class citizens, a class denied their inalienable right to freedom of the press; for as Judge David Bazelon reminds

us, when a government agency requires fairness and balance, it inevitably "nullifies that journalistic discretion which the Framers thought indispensable to our constitutional order."[1]

Our objective here is to go beyond merely considering the Constitutional validity of the fairness doctrine. It is, more appropriately, the broader question of access with which we are concerned, a question that poses a far greater First Amendment dilemma than any one of its manifestations. Our perspective centers on three fundamentally different concepts: (i) the right to be heard, (ii) the opportunity to be heard, and (iii) the right to hear. In brief, our task is threefold: first, to trace the emergence of the notion of access and the attendant right to hear; second, to explain why the right to hear is untenable; and third, to demonstrate the important and necessary disparity between the right to be heard and the opportunity to be heard.

Access, Ownership, and Freedom of Expression

In its classic interpretation the First Amendment was conceived as protection for the individual's right to be heard. Decidedly, its jurisdiction did not extend to protecting the individual's opportunity to be heard. That is, whereas the First Amendment did guarantee certain freedoms for the speaker, it did not guarantee an audience for the speaker. Or in the parlance of contemporary scholarship, the issue of access was clearly beyond the Constitution's purview.

The distinction between the right to be heard and the opportunity to be heard is especially germane to the important and fundamental relationship between economics and freedom of expression (freedom of the press, in particular). Traditionally, only those who owned the means to an audience (e.g.,

a newspaper) had access to an audience; indeed, access and ownership were regarded as inseparable. The opportunity to be heard, therefore, was entirely a matter of economics. But since the right to be heard is meaningless without the opportunity to be heard, in practice only "owners" were afforded First Amendment protection; for "non-owners" the idea of freedom of the press was altogether academic. As press critic A. J. Liebling once put it, "Freedom of the press is guaranteed only to those who own one."

Broadcasting and the First Amendment: Access Without Ownership

The print media have long enjoyed a history of full first amendment protection from governmental intervention. The right of the individual to speak, write, or publish has been guaranteed, in the case of print, insofar as economic barriers to the means of communication can be overcome by the individual.

Inherent in the broadcast media, however, were unique technical constraints which abridged the opportunity of the individual to be heard. In addition to traditional economic barriers to freedom of expression, technical barriers were imposed by broadcasting's limited frequency spectrum.[2] Justice Frankfurter in 1943 described the "basic facts about radio as a means of communication"[3] which called for regulation:

> its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[4]

The unique characteristics of broadcasting, therefore, called for government regulation, and demanded that a special set of standards be

applied in interpretation of the first amendment.

The Broadcaster's Right to be Heard

The Communications Act of 1934 provided for creation of the Federal Communications Commission, and designated as a major FCC responsibility the granting of broadcast licenses in the "public interest, convenience, or necessity."[5] The Act itself made no mention of direct FCC authority over content. Thus, the primary responsibility of the Commission appeared to be the selection of responsible licensees, rather than the regulation of programming content once the licensee had been chosen.

The First Amendment guarantee of freedom of expression as the individual's right to be heard was originally upheld in the special case of broadcasting as a right of the broadcaster. Full protection of the right to be heard was extended to broadcast licensees, as the right and the opportunity to be heard; owners of broadcast facilities were guaranteed freedom of expression and access to an audience. Government regulation served merely to alleviate the unique technical barriers to free expression for individuals who would overcome economic barriers to the means of communication.

That FCC authority was not to be limited to regulation of the technical and engineering aspects of broadcasting, however, soon became evident. In NBC vs. U.S.,[6] the Supreme Court extended FCC authority beyond distribution of licenses, frequencies, hours of operation, and power, to include consideration of matters involving programming. It has been the regulation of broadcasting content which has caused the greatest controversy regarding in what ways, and to what ends, First Amendment freedoms are to be guaranteed in the case of broadcasting.

The history of broadcast regulation following the NBC decision reveals a lack of consistency in First Amendment interpretation such that, as the beneficiary of First Amendment protection has shifted, so have the specific rights and freedoms guaranteed under the First Amendment. The individual's opportunity to be heard, as restricted to the broadcaster in the NBC case, has gradually given way to the conflicting right of the consumer to hear, a right which has been identified as paramount by the FCC and the Courts. Recent legislation, particularly that involving the Fairness Doctrine and Section 315 of the Communications Act, enacted in an attempt to guarantee the consumer's right to hear, has created and guaranteed a freedom until then unrealized -- the opportunity of the consumer to be heard. Guaranteed consumer access to an audience, established by the Supreme Court in Red Lion[7] in its support of the Fairness Doctrine, has essentially removed economic constraints to freedom of expression in broadcasting. Such access without ownership represents a complete re-interpretation of the First Amendment and one which directly opposes the interpretation specified in the NBC case.

The Consumer's Right to Hear

The FCC responsibility for regulation of programming content was not limited to comparison of competing license applicants. Section 303 (r) of the Communications Act empowered the Commission to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."[8] Consequently, the FCC has engaged in a slightly more aggressive form of regulation, largely with the issuance of policy statements which specify programming requirements or suggest programming policy.

The Blue Book,[9] issued by the FCC in 1946, marked a first affirmative effort to protect a consumer "right to hear", by detailing the public service responsibilities of broadcasters:

> In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are: (1) the carrying of sustaining programs . . . (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues, and (4) the elimination of advertising excesses.[10]

The functions of "sustaining programs" were further stated by the Commission as five-fold: "(a) maintaining an overall program balance, (b) providing time for programs inappropriate for sponsorship, (c) providing time for programs serving particular minority tastes and interests, (d) providing time for non-profit organizations -- religious, civic, agricultural, labor, educational, etc., and (e) providing time for experiment and for unfettered artistic self-expression."[11]

In exercising its duty to regulate in the "public interest", the FCC often took into account proposed or past programming. In such cases, the regulations and prescriptions issued by the FCC, such as those in the Blue Book, frequently served as criteria for program evaluation. This was particularly true when two otherwise equally qualified applicants sought the same license, as in Johnston Broadcasting Co. v. FCC,[12] where Commission evaluation of proposed programming was sustained by the Court. Licensee responsibility to program in the public interest thus began to diminish as the FCC began to dictate which type of programming was in the interest of the public.

The FCC's 1949 report on Editorializing by Broadcast Licensees[13] made more explicit both the affirmative public service duties of the broadcaster and the notion of a consumer right to hear. The "fairness doctrine", as the report

has been termed, described licensee editorial responsibility. Broadcasters were required to: (1) "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations", and (2) afford "reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community."[14]

The Fairness Doctrine's protection of the consumer's right to hear was to be achieved at the expense of licensee autonomy. Though the FCC then recognized that "these concepts, of course. . . restrict the licensee's freedom to utilize his station in whatever manner he chooses",[15] the Commission justified such restriction in support of a consumer right to hear: " . . . a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opini on the paramount issues facing the American people is within both the spirit and letter of the first amendment."[16]

Although the requirements of the Fairness Doctrine necessarily restrict licensee autonomy, they presented so vague a set of a priori programming requirements as to be fairly innocuous and to allow for the exercise of lice discretion. Specifically, the broadcaster's fulfillment of editorial respon bilities, designed to insure the consumer's right to hear, was to be evaluat at renewal time on the basis of the "fairness" of overall broadcaster perfor ance. Exactly when and how such responsibilitie were to be fulfilled was a matter left to individual broadcaster judgment.

Section 315 of the Communicatio s Act (the "equal opportunities" provis provided an explicit statement of the concept of a consumer opportunity to b heard:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.[17]

However, since access to broadcaster facilities as outlined in 315 was to be restricted to specific parties, in specific circumstances, and only under licensee authority, the equal opportunities provision still allowed considerable exercise of licensee editorial autonomy. As Schmidt has observed:

> This equal opportunities access right is contingent, not affirmative. That is, the statute provides that "no obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."[18]

Problems arising from Section 315 resulted in amendment of the Act in 1959. The amendment was written to include confirmation of Congressional support of the Fairness Doctrine. However, it omitted specific mention of access obligations as equivalent to fairness obligations. Thus it remained a guarantee of the consumer right to hear with respect to fairness, though it was attached to a guarantee of a consumer opportunity to be heard with respect to politics.

More specifically, until 1959, candidate appearance in newscasts, even when such appearance was incidental to the news story being covered, constituted "use" of a broadcasting station and triggered equal opportunity obligations to be met by the broadcaster. The threat of licensee avoidance of political coverage in an effort to dodge equal opportunity obligations resu in the amendment to exempt some news programming from equal opportunities requirements.

When the Act was amended, an additional clause sanctioning the Fairnes Doctrine was included:

> . . . nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligations imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[19]

The fairness clause as added to 315 neither explicitly defined "reasonable opportunity" nor stated specific circumstances under which the obligation to "afford reasonable opportunity" might be fulfilled. As long as the licensee exercised discretion in choosing the particular programs to be broadcast in fulfillment of fairness requirements, a consumer "opportunity to be heard" did not fall within the scope of a consumer right to hear.

The Consumer's Opportunity to be Heard

It was not until the 1960's that a consumer opportunity to be heard began to emerge at the expense of the broadcaster's right to be heard. Case-by-case review of fairness complaints initiated the specification of broadcaster obligations and introduced the access notion as a means of fulfilling fairness requirements. The FCC invoked particular remedies -- including consumer access -- for particular broadcasts, and further clarified its interpretation of the Doctrine to create a consumer opportunity to be heard. For example, it became clear that "reasonable opportunity" in some cases meant free air time, and that appropriate circumstances to "afford reasonable opportunity" might include an invitation to use broadcast facilities at broadcaster expense.

Such specific broadcaster obligations, including access to facilities, emerged as a result of FCC activity. As Friendly notes, "a series of alleged abuses by radio stations . . . in the early sixties provoked the FCC into extending its still vaguely defined Fairness Doctrine into a rigid primer of standards."[20]

In the Mapoles case of 1962, the FCC specified affirmative broadcaster obligations and issued program requirements which removed licensee discretion in achieving overall fairness in programming.[21] More importantly, access obligations in fulfillment of fairness requirements were detailed in the "personal attack" and "seek out" rulings which emerged in the Mapoles case. The FCC explained:

> Where attacks of a highly personal nature have been made on local political officials, the licensee has an affirmative duty to take all appropriate steps to see to it that the persons attacked are afforded the fullest opportunity to respond.[22]

In another case the same year, station KBMY's failure to (1) supply the victim of personal attacks with copies of the attacks, and (2) promptly afford the victim the opportunity to reply was designated, by the FCC, a failure to fully meet "the requirements of the Commission's fairness doctrine."[23]

The 1963 Cullman case[24] emphasized "the public's paramount right to hear" and established the requirement that broadcasters fulfill fairness obligations at their own expenses when sponsors were not available.

The occurrence of so many fairness cases prompted the FCC to issue the "Fairness Primer" in 1964, which cited FCC rulings interpreting fairness obligations. The purpose of the notice was "to advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of such licensees under the Commission's 'fairness doctrine' " in an effort to "reduce the number of cases required to be referred to the Commission."[25]

The Primer reiterated the "personal attack" and "seek out" rulings which had emerged in the Mapoles and Billings cases, thereby making available to broadcasters the FCC interpretation of fairness, including the concept of access and the consumer's opportunity to be heard. It was within this atmosphere that the Fairness Doctrine was brought before the Supreme Court.

Red Lion and its Ambiguities

The reknowned Red Lion case[26] established the constitutionality of the Fairness Doctrine. The case revolved around a personal attack of author Fred Cook, and involved, specifically, the question of whether a station carrying a personal attack was obligated to provide free reply time regardless of the availability of sponsors. Station WGCB AM and FM in Red Lion, Pennsylvania, designated a "religious commercial station" by the FCC,[27] carried programs of several syndicated religious and anti-Communist crusaders, one of whom was the Reverend Billy James Hargis. In November of 1964, Reverend Billy Hargis' attack of reporter and author Fred Cook was mailed to over 200 stations subscribing to the syndicated program. The broadcast attacked Cook's integrity and accused him of affiliation with Communist enterprises. Friendly describes the broadcast:

> In a stinging personal attack Reverend Hargis lashed out at Fred J. Cook, an investigative reporter who in his own crusades had taken aim at a wide range of targets, from Richard M. Nixon to J. Edgar Hoover, from the CIA to the FBI. Cook's most recent book had been a highly critical biography of the Republican candidate for President, Barry Goldwater, whom Hargis had vigorously supported.[28]

The attack was apparently motivated either by Hargis' disapproval of Cook's book (entitled Goldwater: Extremist on the Right) or, more likely, of Cook's recently published investigative report critical of Hargis' activities.[29] Within a month of the broadcast, Fred Cook wrote to the stations which had broadcast the program and requested free reply time, "as provided in FCC regulations."[30]

The Red Lion station, like most of the others, refused to provide free reply time unless Cook could show that he was unable to pay for the broadcast himself or otherwise locate a sponsor.

Cook then took his complaint to the FCC, which formally ordered the station to provide free reply time. The Red Lion station responded with an appeal to the District of Columbia Circuit Court of Appeals, which upheld the FCC demand of free reply time.[31] The Red Lion case was then brought before the Supreme Court, which unanimously upheld the FCC's original decision ordering the station to provide Cook with air time at its own expense.[32]

The Red Lion case established the constitutionality of the FCC's editorializing and personal attack rules. Specifically, with the Red Lion decision, the Supreme Court sanctioned the consumer's right to hear. Moreover, in its zeal to protect the consumer's right to hear, the Court essentially sanctioned a new and novel First Amendment right: the right of the consumer to be heard. Traditionally, the right to be heard had been extended only to the producer (the broadcaster or publisher) rather than to the consumer. But by establishing the constitutionality of the personal attack and seek out rules tested in Red Lion, the Court not only recognized the consumer's right to be heard but also guaranteed the consumer's <u>opportunity</u> to be heard.

Consumer access to broadcast facilities was established as the only acceptable remedy for personal attack circumstances such as those presented in the Red Lion case. This guarantee of the consumer's "opportunity to broadcast", however, was gained at the expense of licensee autonomy. The broadcaster's newly-conceived obligation to seek out victims of personal attack and to provide free air time for personal reply marked a new interpretation of the First Amendment which was in direct conflict with previous interpretations protecting the broadcaster's right to be heard. The Supreme Court, in fact, practically reversed its interpretation of First Amendment freedoms as outlined in the NBC case. Justice White, in delivering the Red Lion decision, declared:

> . . . as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused . . . the licensee has no constitutional right . . . to monopolize a radio frequency to the exclusion of his fellow citizens.[33]

As Schmidt observes, with Red Lion the "broadcaster's First Amendment claims of autonomy as a barrier to the personal attack and editorializing rules were swept aside."[34]

In direct opposition to the Court's Red Lion interpretation of the First Amendment stood the NBC decision, which clearly supported licensee autonomy and explicitly denied the notion of consumer access to, without ownership of, broadcast facilities. Justice Frankfurter recognized that "freedom of utterance is abridged to many who wish to use the limited facilities of radio", but declared that the "right of free speech does not include . . . the right to use the facilities of radio without a license."[35]

The Court in Red Lion sought to guarantee the consumer's right to hear, explaining that it "is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[36] In its attempt to protect that right, the Court inadvertently created and sanctioned a new right which directly abridged the previously guaranteed right of the broadcaster. How the Court was to reconcile the ambiguity involved in the creation of the consumer's right to be heard was a question left unresolved.

Access, Diversity, and Freedom of Expression

What is at issue in Red Lion, of course, is the very idea of access, an idea that is well on its way to becoming the most provocative First Amendment dilemmas of this century. As Lange cogently surmises, "the access question is nothing less than an inquiry into the proper structure and purpose of the American press."[37]

Unhappily, the FCC and the Supreme Court have dealt with access in a trivial and token manner, an approach that betrays a fundamental disregard for the important and essential disparity between the right to be heard and the opportunity to be heard. As exemplified by the FCC's fairness doctrine and the Supreme Court's decision in Red Lion, access has come to rest on an arbitrary and contrived distinction between consumer and producer, an ill-conceived dichotomy that can only serve to cloud the still unresolved issue of access. More substantively, the prevailing notion of access not only fails to insure a diversity of viewpoints but, more insidiously, runs counter to the idea of freedom of expression. For if broadcasters are expected to tailor their expressions in an effort to accommodate a consumer's right to hear, the broadcaster's right to be heard is necessarily restricted. Briefly and harshly, by establishing a right to hear the FCC and the Supreme Court have unavoidably abridged the broadcaster's freedom of expression, an intolerable and altogether unnecessary violation of the First Amendment.

In its broadest terms the access issue centers on one very basic question: whether, as Schmidt phrases it, ". . . the First Amendment, in essence, states a constitutional policy in favor of the broadest diversity of expression, and nothing more, or whether the First Amendment guarantees individual (or institutional) autonomy from government regulation with respect to the content of expressions."[38] Curiously though consistently, the courts have opted for the former: for diversity at the expense of government intervention, for a marketplace of ideas at the expense of freedom of expression, for fairness and balance at the expense of a robust, partisan, and impassioned press. At least insofar as broadcast media are concerned,[39] the Supreme Court views access as having more to do with the right to hear than with the opportunity to be heard. And this interpretation is, we intend to argue, an unreasonable and

largely unwarranted extension of the Constitution's jurisdiction.

Access As the Right to Hear

As the Supreme Court made clear in Red Lion, it is the right of the consumer (the viewer and listener), not the right of the producer, which is paramount. Broadcast media ought to function ". . . consistently with the ends and purposes of the First Amendment"; and the purpose of the First Amendment, the Court ruled, is to preserve an uninhibited marketplace of ideas. Ergo, the right to hear: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas. . . ."[40]

Thus, the folly of the Court's decision in Red Lion lies not in its desire for a free and robust marketplace of ideas but rather in its view that such a marketplace is somehow an American imperative. For to regard the marketplace metaphor as anything more than an idealized goal toward which a democratic society might strive would indeed run counter to the First Amendment. To be sure, to guarantee such a marketplace, as the Supreme Court tries to do in Red Lion, necessarily impairs the free flow of ideas.[41] Therefore, if the Constitution is intended to promote freedom of expression it does not follow that diversity of opinion is its necessary goal. Lange writes:

> If the first amendment protects against the supression of ideas, it follows that a market-place of sorts may emerge. It does not follow that a market-place necessa rily will emerge or that if it does the result will seem fair or balanced. Most clearly it does not follow that a balanced market-place ought to be established. The question is entirely fair, and its answer may even seem clear on other grounds, but it is not answered by proposals for effective public forums. The question remains whether the market-place can or ought to be anything more than accident or myth.[42]

Clearly, the unfortunate implication in Red Lion is that a diversity of viewpoints is necessarily and always associated with, or connected to, freedom of expression. But as Owen demonstrates, there is little validity to such

reasoning:

> Most people seem to think that diversity is a good thing, but it is not obvious why this should be so. In the area of freedom of expression, "diversity of viewpoints" is often used synonymously with freedom itself . . . and this has resulted in much judicial mischief. After all, a totalitarian state might, if it wished, offer the public access to a diversity of viewpoints, even though no one had any freedom of expression.
>
> Similarly, a monopolist might choose to produce a wide range of opinions for his audience. This would go some ways toward relieving the effect of monopoly on consumers, or on the audience, but does not provide effective freedom for speakers. The First Amendment clearly meant to apply to speakers, and while it may be based partly on the theory that freedom for speakers is good for the audience, this does not justify the substitution of government or monopoly supplied diversity in place of freedom for speakers.[43]

Interestingly, even Jerome Barron, the right to hear's most zealous proponent, has characterized the notion of a marketplace of ideas as "romantic," "banal," and "unrealistic." The Justices of the Supreme Court, Barron complains, have ". . . failed to give the 'marketplace of ideas' theory of the first amendment the burial it merits."[44] And yet, Lange reminds us, a careful reading of Barron's argument ". . . suggests that he is himself a victim of the market-place myth."[45] Indeed, Barron expressly hopes for ". . . effective utilization of media for the expression of diverse points of view"; his stated premise is that ". . . a provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion to be voiced."[46] In effect, then, what Barron seems to be advocating is a kind of <u>intra-media</u> diversity, where each and every medium becomes a marketplace unto itself.

Now the inherent problem with Barron's variation on the marketplace theme is simply that it denies the economic realities of most any "marketplace" and at the same time affords only the most token kind of access. Following Owen, it is analogous to creating a consumer right to attach accessories to automobiles:

> I am not saying that it is undesirable to allow as many people as wish to, to manufacture (say) automobiles, of all descriptions. What would be intolerable is a "right" on the part of anyone to attach accessories to the automobiles of any manufactuer, forcing the manufacturer to sell the unit with the car. Such a right would simply reduce the value of automobiles, and certainly increase their prices, with the result that few would be sold.

Thus, Owen concludes:

> Freedom of access cannot be taken to mean the right to insert messages "in the midst of" a package of edited messages for which some one else has built up a paying audience and good will. To accept this right would in effect destroy the incentive to invent and compete in the market for edited packages of messages.[47]

Moreover, access of this kind fails to resolve the larger issue of who should be in control of programming and who should be responsible for content. Finally, Barron's conception of access is likely to result in more content homgeneity than ever before, hardly the desired outcome. That is, since all radio and television staions would be -- as they are now -- subject to the same bland formula of fairness and balance, it becomes increasingly difficult for any station to emerge with its own distinctive voice.

Ironically, when a station does emerge with a distinctive point of view at the exclusion of contrary points of view -- precisely the kind of impassioned voice the First Amendment is expected to promote and protect -- it is likely to be in violation of the fairness doctrine. And to deny a station its license for violating the fairness doctrine is the ultimate paradox; for as Judge Bazelon seemed to sense in his dissenting opinion in Brandywine,[48] any strict rendering of fairness requirements, to the extent that it may result in removing a station from the air, is not only a prima facie violation of the First Amendment but deprives the listening public of both a particular point of view and robust debate. "It is beyond dispute," Bazelon concludes, "that the public has lost access to information and ideas."[49]

In sum, the fundamental error in the Supreme Court's decision in Red Lion centers on one largely invalid premise: ". . . that the government has an obligation to promote conditions that would have the same end effect as freedom of expression (that is, an informed public), and that this obligation must be exercised through direct regulation of content of electronic media."[50] For to require broadcasters to accommodate opposing points of view -- ostensibly to fulfill the public's need to be informed -- is to impose a prior restraint on programming, the broadcasters' "expressions"; there may well emerge a multitude of speakers, but only at the expense of an independent press. In the final analysis neither freedom of expression nor a diversity of viewpoints is well served by government imposed fairness requirements. There is little support, Lange concludes, for the proposition that all ideas must be accommodated by the mass media. "Abstractly the proposition may be attractive; as a practical reflection of legal doctrine, it would destroy more than it would yield."[51]

Access As the Opportunity to be Heard

There is, as we have suggested, an important disparity between the right to be heard and the opportunity to be heard. Whereas the right to be heard is afforded protection by the First Amendment, the opportunity to be heard is not. More to the point, freedom of expression is legitimately a Constitutional issue; the question of access is not.

Unwittingly the FCC and the courts have created a Constitutional issue out of the question of access by blending together the right and the opportunity to be heard. In effect, what the FCC requires -- and what the courts sanction -- is that when broadcasters are "granted" the opportunity to be heard (i.e., issue a license) their right to be heard is necessarily and acceptably

compromised, as though the threat of government censorship is somehow more tolerable than the threat of private censorship. Broadcasters' right to be heard is compromised in the sense that they are no longer solely responsible for their programming; instead, the doctrines of fairness and balance require broadcasters to operate, in a limited sense, as common carriers. And the justification for this status rests largely on the premise that broadcast media ought to provide, in Barron's words ". . . an effective forum for the expression of divergent opinions."[52]

Now, undeniably there is a need for the public to decide wisely on issues of public concern, and thus there is a need for the public to be well informed; and from this we might reasonably conclude that a marketplace of ideas is indeed desirable. But, as Lange insists, it does not follow that the public is therefore entitled to a "right to be informed," and so it does not follow that mass media (electronic media in particular) should be required to provide a fair and balanced presentation of issues, opinions, and ideas. In short, we agree with Owen in that the Constitution, reasonably interpreted, does not endow the public with a right to hear through a government conceived scheme of regulation; "on the contrary, the Constitution appears to say that government is to have no direct control over the process by which people are informed."[53]

Accordingly, if the right to hear is dismissed as an untenable First Amendment interpretation, it then becomes possible to view access strictly in terms of the opportunity to be heard, a view that conveniently precludes any First Amendment controversy. Just as the right and the opportunity to be heard have been held to be distinct and separate in regard to print media,[54] the same policy might just as easily apply to broadcast media. With an appreciative nod to Marshall McLuhan, the medium and the message need to be differentiat-

ed: whereas the means of transmission (the medium) may justifiably be subject to external constraints, the expression of ideas (the message) must remain free from any form of intervention.[55] Thus, it may well be within the government's jurisdiction to resolve questions of access (i.e., the opportunity to be heard), but only so long as these resolutions (e.g. licensing) are not accompanied by implied or proscribed restrictions on the right to be heard.

That not everyone and every idea will always have the opportunity to be heard is a fundamental truism about which little needs to be said. To suggest that those who have the right to be heard must also have the opportunity to be heard would be as ludicrous as the FCC providing every man, woman, and child radio and television receivers so that the opportunity to hear could be extended to those who, presumably, had the right to hear. At bottom, questions of access and questions of freedom of the press can exist on a mutually exclusive basis only when those who are afforded the opportunity to be heard remain free to decide which expressions are worthy of dissemination. For if broadcasters are going to be held accountable for their programming, and if in fact they are to be expected to perform in the "public interest, convenience, and necessity," then they must be free to accept responsibility for their expressions; or put another way, broadcasters must be afforded the freedom to be responsible.

1. David L. Bazelon, "FCC Regulation of the Telecommunications Press," Duke Law Journal, 1975:236 (May 1975).

2. It is important to recognize that scarcity is actually an economic rather than technical problem. That is, the number of broadcast outlets need not necessarily be restricted. However, implementation of the available technology for expansion of the "usable portion" of the spectrum would entail costly revision of the broadcast industry. For a discussion of the limitations of a scarcity argument see Bazelon, "FCC Regulation of the Telecommunications Commission," The Journal of Law and Economics, 2:1-40 (October 1959); Chuck Jackson, "Policy Options for the Spectrum Resource," in Options Papers prepared by the staff for use by the Subcommittee on Communications of the Committee on Interest and Foreign Commerce (Washington D.C.: U.S. Government Printing Office, 1977), pp.1-33; and Chip Shooshan, "Memorandum," in Options Papers, p. 78.

3. National Broadcasting Company v. United States, 319 U.S. 190 (1943). Also in Donald M Gillmor and Jerome A. Barron, Mass Communication Law 2nd ed. (St. Paul: West Publishing Co., 1974), PP 769-770.

4. Gillmor and Barron, p.764.

5. Communications Act of 1934, 47 USCA Sections 307 (a)(d), 309 (a), 310,312. Also in Frank J. Kahn (ed.), Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1968), pp. 54-94.

6. The NBC case, which occurred in response to FCC Chain Broadcasting Regulations, outlined the rationale for broadcast regulation. It established FCC authority over matters beyond technical and engineering aspects of broadcasting to include content and source of programming.

7. Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969). Also in Gillmor and Barron, pp. 807-816.

8. See Kahn, p.67.

9. "Public Service Responsibilities of Broadcast Licenses" (1946). Also in Kahn, pp. 125-206.

10. Kahn, p. 198.

11. Kahn, p. 199.

12. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 80, 175 F. 2d 351 (1949). Also in Gillmor and Barron, pp. 780-782.

13. "In the Matter of Editorializing by Broadcast Licensees," 13 FCC 1246 (1949) Also in Kahn, pp. 361-374.

14. Kahn, p. 373.

15. Kahn, p. 366

16. Kahn, p.372.

17. Kahn, p. 79.

18. Benno C. Schmidt, Jr., Freedom of the Press vs. Public Access (New York: Praeger, 1976), p. 144.

19. Kahn, p.79

20. Fred W. Friendly, The Good Guys, The Bad Guys and the First Amendment (New York: Random House, 1976), p.30.

21. Clayton W Mapoles, FCC 62-501, 23 R.R. 586 (May9, 1962). See also Kahn, p. 391.

22. Kahn, p. 391.

23. FCC 62-736.23 R.R. 951 (Jult 13, 1962). Also in Kahn, p. 391.

24. Cullman Broadcasting Co., 40 FCC 516 (1963). Aslo cited in Gillmor and Barron, p. 817.

25. Kahn, p. 377.

26. See Gillmor and Barron, pp. 807-816.

27. Friendly, p.6.

28. Friendly, p.4.

29. The Nation, May 25, 1964.

30. Letter from Fred J. Cook to station WGCB, Decenber 19, 1964. In Friendly, p.1

31. Red Lion Broadcasting Co. v. Federal Communications Commission, 381 F.2d 908. Also in Gillmor and Barron, pp. 805-806.

32. 395 U.S. 367 (1969). See Gillmor and Barron, pp. 807-816.

33. Gillmor and Barron, p. 813.

34. Schmidt, p. 163.

35. Gillmor and Barron, p. 767.

36. Gillmor and Barron, p. 813.

37. David L. Lange, "The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," The North Carolina Law Review, 52: 1 (November 1973).

38. Schmidt, p. 31.

39. In Miami Herald Publishing Co. v. Tornillo (1974), The Supreme Court ruled that a right to reply statute in Florida - analogous to the personal attack section of the fairness doctrine - was unconstitutional in its application to the print media. See Gillmor and Barron, pp. 967-975; also Schmidt, pp.219 - 235.

40. Gillmor and Barron, p. 813.

41. "It is doubtful that the First Amendment really contains an implied 'right to hear' distinct from freedom of expression. The whole concept of such a right, and its exercise, runs counter to the most basic notions of freedom of expression, precisely because the institutional arrangements impled by first right requires subjugation of the secind." See Bruce M. Owen, Economics and Freedom of Expression (Cambridge:Ballinger Publishing Co., 1975), p.25.

42. Lange, p.11.

43. Owen, p. 20.

44. Jerome A. Barron, "Access to the Press - A New First Amendment Right," in Gillmor and Barron, p. 555. See also Jerome Barron, Freedom of the Press for Whom? (Bloomington: Indiana University Press, 1973).

45. Lange, p. 10.

46. Gillmor and Barron, p. 570.

47. Owen, pp. 22-23.

48. Brandywine - Main Line Radio v. Federal Communications Commission, 473 F.2d 16 (D.C. Cir. 1972). Also in Gillmor and Barron, pp. 836-845.

49. Gillmor and Barron, p. 841.

50. Owen, p.25

51. Lange, p.91.

52. Gillmor and Barron, p.572.

53. Owen, p. 107.

54. For example, in Associated Press v. United States, 326 U.S. 1, 20 (1944), the Supreme Court ruled, in effect, that the opportunity to be heard could be subject to anti-trust laws; but at the same time the court made no effort to tamper with AP's right to be heard. See Gillmor and Barron, pp. 631-636. Interestingly, though, the Court cited the AP case in its Red Lion decision as support for the constitutionality of the fairness doctrine. See Gillmor and Barron, p.814.

55. For a proposal on how the medium could be divorced from the message so that the means of transmission could be regulated without violating the message originator's sovereignty, see Bruce M. Owen, "Public Policy and Emerging Technology in the Media," Public Policy, 18: 546-547 (Summer 1970).